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Office of the Secretary
Federal Communications Commission
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Re: Petition of Prime Health Services, Inc. for Declaratory Ruling

Dear Secretary:

Enclosed please find an original and two copies of the Petition of Prime Health Services, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver. Please date stamp the copy of this letter as proof of receipt of same and return it to me in the envelope provided. By copy of this letter, all interested parties are being served with a copy of the enclosed document.

If you have any questions, please contact me.

Thank you.

Very truly yours,

HINSHAW & CULBERTSON LLP



Elizabeth A. Odian

EAO:baw
Enclosures

cc: Charles H. Barr
Robert L. Carter

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:

Petition of Prime Health Services, Inc. for
Declaratory Ruling to Clarify Scope and/or
Statutory Basis for Rule 64.1200(a)(3)(iv)
and/or for Waiver

CG Docket No. 05-338

**PETITION OF PRIME HEALTH SERVICES, INC. FOR DECLARATORY RULING
AND/OR WAIVER**

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**PETITION OF PRIME HEALTH SERVICES, INC. FOR DECLARATORY RULING
AND/OR WAIVER**

Pursuant to Section 1.2 of the Federal Communications Commission (Commission) rules,¹ Prime Health Services, Inc. (Prime Health), respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(3)(iv) of the Commission's rules does not apply to fax advertisements sent with the prior express consent or permission of the recipient (solicited faxes), or in other words, that solicited faxes need not include the opt-out notice required for unsolicited fax advertisements. Alternatively, Prime Health requests that the Commission clarify that the statutory basis for Section 64.1200(a)(3)(iv) is not 47 U.S.C. § 227(b). Should the Commission decline to issue either declaratory ruling, Prime Health respectfully requests that the Commission grant retroactive waivers of Section 64.1200(a)(3)(iv) pursuant to Section 1.3 of the Commission's rules² for solicited faxes previously transmitted by Prime Health.

¹ 47 C.F.R. § 1.2; 5 U.S.C. § 554(e).

² 47 C.F.R. § 1.3

INTRODUCTION

Prime Health is currently facing a class action lawsuit seeking millions of dollars in damages for sending faxes to customers who expressly consented to receive them. Despite consenting to receipt of these faxes, the plaintiffs allege that Prime Health violated the Telephone Consumer Protection Act (TCPA), which prohibits sending an “unsolicited advertisement” by fax. In so alleging, plaintiffs rely on Section 64.1200(a)(3)(iv), a regulation issued by the Commission in an order implementing amendments to the TCPA. That regulation requires that certain opt-out language appear on faxes. However, the scope of that regulation is unclear as part of the rule expressly limits its reach to unsolicited faxes, while also referencing recipients that have agreed to receive such faxes. Confusion over the meaning of Section 64.1200(a)(3)(iv) and whether that section is grounded in the TCPA has led to disputes across the nation, a split of authority, and numerous petitions to the Commission seeking clarification.

Prime Health requests that the Commission resolve this uncertainty by declaring that Section 64.1200(a)(3)(iv)’s ambiguous language should be limited to unsolicited faxes, as that reading best accords with the TCPA’s language and legislative history, and avoids an interpretation that would render the rule unlawful under basic principles of administrative law and the First Amendment. Alternatively, Prime Health requests that the Commission clarify that the statutory basis for Section 64.1200(a)(3)(iv) is not the TCPA. Through either of these actions, the Commission can ensure that its rules are consistent with Congress’ intent, in addition to providing much needed guidance to courts and litigants. If the Commission declines to issue either declaratory ruling, Prime Health requests retroactive waivers of Section 64.1200(a)(3)(iv) for solicited faxes. Neither the Commission’s goals nor the public interest are served by subjecting Prime Health to million dollar lawsuits from plaintiffs who expressly consented to receipt of faxed advertisements and therefore suffered no actual harm.

BACKGROUND

The TCPA prevents the use of a telephone facsimile machine to send an “unsolicited advertisement” to another fax machine.³ Since the Act's original passage in 1991, Congress has exempted solicited fax advertisements from its regulation. The TCPA defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person's prior express invitation or permission.*”⁴ This definition unambiguously excludes from the TCPA restrictions on fax advertisements sent *with* the recipient's “prior express invitation or permission.”

Although the TCPA initially required the recipient's express consent, Congress amended the TCPA in 2005, through enactment of the Junk Fax Prevention Act of 2005 (“JFPA”), to permit the transmission of unsolicited faxes to persons with whom the sender has an “established business relationship” (EBR). The only caveat to the new rule was that such advertisement must contain an “opt-out” notice.⁵ Notably, the TCPA, as amended by the JFPA, continues to cover only fax advertisements that are transmitted without an individual's “express invitation or permission.” Thus, by its terms, the TCPA's general prohibition against fax advertisements and the EBR exception to that prohibition do not apply to faxes transmitted with a recipient's prior express consent.

After passing the JFPA, the Commission sought comment on proposed implementing regulations and, in 2006, issued a final order (“JFPA Order”) that “amend[ed] the Commission's

³ 47 U.S.C. §§ 227(a)(5) & (b)(1)(C).

⁴ *Id.* § 227(a)(5) (emphasis added).

⁵ *Id.* § 227(b)(1)(C)(i)-(iii); see *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19,758 (2005) (“JFPA NPRM”) (explaining regulatory background of EBR provision). Congress left the definition of an unsolicited advertisement largely unchanged, simply adding a clause to clarify that express permission could be given “in writing or otherwise.”

rules on unsolicited facsimile advertisements.”⁶ Despite the TCPA’s express limitation to unsolicited faxes, one of the rules adopted by the Commission, Section 64.1200(a)(3)(iv), references opt-out notices for faxes “sent to a recipient that has provided prior express invitation or permission.”⁷ The scope of that provision is unclear, however, as it is confusingly worded as part of a rule that also references *unsolicited* faxes.⁸

The JFPA Order also contains contradictory language regarding the scope of Section 64.1200(a)(3)(iv), simultaneously explaining that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements” and that an opt-out notice is required for solicited faxes “to allow consumers to stop unwanted faxes in the future.”⁹ The administrative record sheds no light on the scope of the rule because the Commission never sought comment on applying the TCPA to solicited faxes. Although the Office of General Counsel has argued that Section 64.1200(a)(3)(iv) should be read to apply to solicited faxes, the Commission itself has yet to opine on the issue.¹⁰

Meanwhile, Section 64.1200(a)(3)(iv) has had unintended and unjust consequences, subjecting Prime Health and numerous other companies to lawsuits seeking damages for engaging in authorized communications with their customers or potential customers that are entirely permissible under the TCPA. Not surprisingly, in order to obtain a quick buck, lawyers for plaintiffs suffering no actual harm have seized upon Section 64.1200(a)(3)(iv)’s reference to solicited faxes to bring class action lawsuits under Section 227(b) of the TCPA, which authorizes

⁶ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“JFPA Order”); see also JFPA NPRM, 20 FCC Rcd 19,758.

⁷ 47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added).

⁸ See *id.*

⁹ JFPA Order, 21 FCC Rcd at 3810, 3812, ¶¶ 42 n.154, 48 (emphasis added).

¹⁰ See Amicus Brief for the Federal Communications Commission Urging Reversal at 13-14, *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2012), 2012 WL 725733.

a private right of action to recover statutory damages based on a violation of “this subsection or the regulations prescribed under this subsection.”¹¹ Many of these lawsuits seek millions of dollars in damages, despite the fact that the plaintiffs fully and freely admit that they expressly agreed to receive the faxes.¹² These suits are premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that the plaintiffs deem inadequate. Prime Health is currently the defendant in such a lawsuit. After obtaining the plaintiff’s express permission to do so, Prime Health faxed a single contract to the named plaintiff. Prime Health now faces a putative class action exposing it to damages upwards of \$1 million for the simple fact that this one fax did not contain an opt out notice allegedly required by Section 64.1200(a)(3)(iv).

In *Nack v. Walburg*, The Eighth Circuit Court of Appeals addressed the issue of whether the TCPA provides a basis for liability where, as here, the plaintiffs expressly agreed to receive the fax advertisements.¹³ In that case, Walburg initially won before the circuit court, which concluded that the TCPA did not provide a basis for liability under those circumstances. However, the Eighth Circuit overruled that decision.¹⁴ The court of appeals agreed with the Office of General Counsel that Section 64.1200(a)(4)(iv) should be read to apply to solicited faxes. Importantly, however, the Eighth Circuit in no way suggested that the Commission lacks

¹¹ 47 U.S.C. § 227(b)(3)(A)-(B).

¹² See, e.g., Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling and/or Waiver, *In re Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver* (hereinafter “Walburg Petition”); Anda, Inc. Petition For Declaratory Ruling at 2, *In re Petition for Declaratory Ruling to Clarify That 47 U.S.C. 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, CG Docket No. 05-338 (FCC Nov. 30, 2010) (hereinafter “Anda Petition”); Petition of Staples, Inc. and Quill Corporation For Rulemaking and Declaratory Ruling at 6, *In re Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket No. 05-338 (FCC July 19, 2013) (hereinafter “Staples Petition”).

¹³ 715 F.3d 680, 682 (8th Cir. 2013).

¹⁴ See *id.* at 687.

discretion to read the rule differently.¹⁵ The court also indicated that Mr. Walburg might obtain relief from the Commission.¹⁶ Given the Eighth Circuit's ruling, Prime Health moved to stay the lawsuit pending in Wisconsin state court until the Commission addresses the present petition, and for any subsequent review.

ARGUMENT

I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO ELIMINATE UNCERTAINTY REGARDING THE SCOPE OF AND STATUTORY BASIS FOR SECTION 64.1200(A)(3)(IV).

Congress has granted to the Commission the "sound discretion" to issue a declaratory ruling in order to "terminate a controversy or remove uncertainty."¹⁷ Here, there is both controversy and uncertainty over the scope of and statutory basis for Section 64.1200(a)(3)(iv). That uncertainty is confirmed both by the flood of lawsuits across the country involving solicited faxes and the numerous petitions that have been filed with the Commission.¹⁸ Accordingly, the Commission should issue a declaratory ruling to clarify that fax advertisements transmitted after express consent was obtained from the recipient are not required to contain an opt-out notice, or, in the alternative, that the statutory basis for Section 64.1200(a)(3)(iv) is not 47 U.S.C. § 227(b).

¹⁵ See *id.* at 685 ("defer[ing]" to the interpretation proffered by the Office of General Counsel).

¹⁶ See *id.* at 687 ("On remand, the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.").

¹⁷ 5 U.S.C. § 554(e); see 47 C.F.R. § 1.2(a) ("The Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

¹⁸ See *In re Southwestern Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19,898, 19,900 ¶ 5 (1999) (agreeing to issue declaratory ruling where there was "substantial uncertainty whether and to what extent" pending class action lawsuits were precluded by the Communications Act, as evidenced – in part – by "extensive comments . . . filed by interested parties" in response to Southwestern's petition). Respectfully, the Consumer and Governmental Affairs Bureau erred by refusing to decide the petition filed by Anda, Inc. on the ground that there is no controversy or uncertainty. See *In re Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, Order, 27 FCC Rcd 4912 (2012); Anda Petition; Walburg Petition.

A. The Commission should clarify that Section 64.1200(a)(3)(iv) does not apply to Solicited Faxes.

The Commission should interpret Section 64.1200(a)(3)(iv) to apply only to unsolicited faxes for at least three reasons: (1) the plain language of the rule, and the order promulgating that rule, is unclear on the provision's scope, and excluding solicited faxes best comports with the text and legislative history of the TCPA; (2) interpreting Section 64.1200(a)(3)(iv) to apply to solicited faxes would exceed the Commission's statutory authority under the Act; and (3) reading the provision to reach solicited faxes would violate the First Amendment.

1. **Section 64.1200(a)(3)(iv) applies only to unsolicited faxes because the language of the rule is unclear in its scope, and excluding solicited faxes best comports with Congress's intent to regulate unsolicited faxes.**

Section 64.1200(a)(3)(iv) provides in relevant part:

(a) No person or entity may:

(3) Use a telephone facsimile machine, computer, or other device to send an *unsolicited advertisement* to a telephone facsimile machine, unless –

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.¹⁹

The text of Section 64.1200(a)(3)(iv) does not make sense as drafted. The rule contains references to both unsolicited faxes and faxes sent with express permission making it impossible to tell from the text alone whether the opt-out notice must be included in solicited as well as unsolicited faxes.

The JFPA Order is equally confusing. The Order makes almost no mention of the rule

¹⁹ 47 C.F.R. § 64.1200(a)(3)(iv).

codified in Section 64.1200(a)(3)(iv). The Order consists of just one brief paragraph mentioning the new rule and provides no explanation or discussion of the basis for that rule, other than that an opt-out notice is required “to allow consumers to stop unwanted faxes in the future.”²⁰ But as the Eighth Circuit recognized, the JFPA Order is internally contradictory, because elsewhere the Commission explained that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”²¹ Given these ambiguities, it is entirely unclear whether Section 64.1200(a)(3)(iv) applies to solicited faxes.²²

The Commission should end this uncertainty and declare that Section 64.1200(a)(3)(iv) does not apply to fax advertisements that were sent with the prior express consent of the recipient, as that interpretation best accords with the text and history of the TCPA. As explained above, the TCPA is expressly limited to “unsolicited advertisement[s],” the definition of which excludes any fax advertisement sent with the recipient’s “prior express invitation or permission.”²³ Likewise, the legislative history of the original TCPA enactment makes clear that the purpose of the Act was to address the problem of “unsolicited” fax advertisements.²⁴ Notably, the legislative history of the JFPA is no different, showing that Congress meant only to “[c]reate a limited [EBR] statutory exception to the current prohibition against the faxing of unsolicited advertisements,” and for those “unsolicited advertisements,” to require “notice of a recipient’s ability to opt out of receiving any future faxes containing unsolicited

²⁰ JFPA Order ¶ 48.

²¹ *Id.* ¶ 42 n.154; see *Nack*, 715 F.3d at 684.

²² See, e.g., *Nack v. Walburg*, No. 4:10CV00478, 2011 U.S. Dist. LEXIS 8266, at *11 (E.D. Mo. Jan. 28, 2011) (“Reviewing the regulation as a whole, the provision in question . . . purports, on its face, to apply only to unsolicited faxes.”), *overruled by* 715 F.3d 680 (8th Cir. 2013).

²³ 47 U.S.C. § 227(b)(1)&(2); *id.* § 227(a)(5).

²⁴ 5 S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970 (“The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine.”).

advertisements.”²⁵ There is no indication whatsoever that Congress was concerned about communications between businesses and their consenting customers.²⁶ Rather, Congress intended for the opt-out requirement to address a narrow issue—the possibility that implied consent based on an EBR would result in unwanted faxes. Due to this possibility, Congress required fax advertisements sent pursuant to the EBR exception to include detailed notice on how to opt out.

Because Congress never intended for the TCPA to restrict transmission of solicited faxes, it is unsurprising that the Commission never provided notice, in its notice of proposed rulemaking or elsewhere, that it was even considering applying any regulations to solicited faxes. Accordingly, the Commission should interpret Section 64.1200(a)(3)(iv) to apply only to unsolicited faxes.

2. Interpreting Section 64.1200(a)(3)(iv) to apply to solicited faxes would render that regulation unlawful because Section 227(b) of the Communications Act is limited to unsolicited advertisements.

By excluding solicited faxes from the reach of Section 227(b), Congress has limited the Commission’s regulatory jurisdiction to unsolicited fax advertisements.²⁷ The Commission itself has recognized – in the JFPA Order and elsewhere – that the TCPA is limited to unsolicited fax advertisements.²⁸ If Section 64.1200(a)(3)(iv) were nevertheless applied to solicited faxes, then the rule must be invalidated as *ultra vires*. Simply put, the TCPA does not grant the Commission

²⁵ S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.A.N. 319, 319.

²⁶ See *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003) (reviewing legislative history).

²⁷ See *Am. Library Ass’n v. FCC*, 406 F.3d 689, 715 (D.C. Cir. 2005) (“[T]he Commission can only issue regulations on subjects over which it has been delegated authority by Congress.”); *ACLU v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987) (where Congress has addressed a question with a “specific statutory provision,” the Commission lacks the authority to “weigh in” with a contrary regulation on the same subject).

²⁸ See, e.g., *JFPA Order*, 21 FCC Rcd at 3788-89, 3791, ¶¶ 1-3, 7 (referring multiple times to Commission “rules on unsolicited facsimile advertisements”); 21 FCC Rcd at 3810, ¶ 42 n.154 (opt-out requirements apply only to “communications that constitute unsolicited advertisements”); *JFPA NPRM*, FCC Rcd at 19,758, ¶ 1 (announcing “propose[d] modifications to the Commission’s rules on unsolicited facsimile advertisements”).

authority to regulate faxes transmitted with the prior express consent of the recipient.²⁹ Interpreting Section 64.1200(a)(3)(iv) of the Commission's rules to apply only to unsolicited fax advertisements is thus the only proper reading of the rule.

3. Applying Section 64.1200(a)(3)(iv) to faxes sent with prior express consent would violate the First Amendment.

The First Amendment to the U.S. Constitution provides an independent reason to interpret the provision as applying only to unsolicited fax advertisements. Under well-established Supreme Court precedent, truthful commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation "is not more extensive than is necessary to serve that interest."³⁰ The Commission has made no attempt to meet its burden of building a record to justify applying Section 64.1200(a)(3)(iv) to solicited advertisements, nor has it articulated how requiring an opt-out notice for solicited faxes directly advances an important government interest or why any such interest could not be addressed by a less restrictive requirement.³¹ As the Eighth Circuit suggested, and other petitions to the Commission have explained, the balancing of interests regarding unsolicited faxes (the regulation of which has withstood First Amendment scrutiny) and solicited faxes (which the Commission has never attempted to defend) is different.³² Indeed, the government's interest is much weaker where, as here, the recipient expressly consented to

²⁹ See *Nack*, 715 F.3d at 682 (expressing doubt as to whether "the regulation at issue [if interpreted to apply to solicited faxes] properly could have been promulgated" under Section 227(b)); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) (explaining that administrative agencies' "power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires"); *id.* at 1871 ("[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority . . .").

³⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

³¹ See, e.g., *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (careful cost and benefit analysis required before speech rights can be burdened); *Edgefield v. Fane*, 507 U.S. 761, 770-71 (1993) (government bears burden to develop record sufficient to justify state interest).

³² *Nack*, 715 F.3d at 687 ("Suffice it to say, the analysis and conclusions as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements."); see *Anda Petition* at 11; *Staples Petition* at 14-16.

receive the facsimile and therefore has a simple and effective method of communicating an opt-out request to the sender. Furthermore, even assuming the same government interest articulated in the context of unsolicited faxes could support the application of Section 64.1200(a)(3)(iv) to the solicited faxes (i.e., the government's interest in preventing advertising cost-shifting from businesses to consumers), the opt-out requirement is irrelevant to that interest.

B. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(3)(iv) Is Not 47 U.S.C. § 227(b).

If the Commission declines to interpret Section 64.1200(a)(3)(iv) to exclude fax advertisements for which the sender has obtained prior express consent, the Commission should at least issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for its rule. Such a ruling would clarify the Commission's authority for Section 64.1200(a)(3)(iv) while making clear to litigants and the courts that solicited faxes sent without the opt-out language described in the Commission's rules cannot form the basis of a private action under the TCPA.

The statutory basis for Section 64.1200(a)(3)(iv) is not clear.³³ The Commission cited eleven different statutory provisions in the JFPA Order as authority for the multiple amendments it made to Section 64.1200, of which Section 64.1200(a)(3)(iv) was only one.³⁴ The JFPA Order did not identify which of these eleven statutory provisions authorized promulgation of 64.1200(a)(3)(iv). Thus, it is unclear whether the Commission relied on its authority under

³³ 4 As explained in other petitions seeking similar relief, the Commission is obligated under the Administrative Procedure Act to state the statutory basis of its rule. See 5 U.S.C. § 553(c); *Anda Petition* at 11-15; *Forest Pharmaceuticals, Inc. Petition For Declaratory Ruling and/or Waiver* at 15-16, *In re Petition for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii)*, CG Docket No. 05-338 (FCC June 27, 2013); *Walburg Petition* at 12 n.34.

³⁴ See *JFPA Order*, 21 FCC Rcd at 3817, ¶ 64 (adopting order "pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318").

Section 227 (which contains the private right of action provision) in promulgating Section 64.1200(a)(3)(iv), or on one of the other cited provisions. A clarification by the Commission that its basis for promulgating Section 64.1200(a)(3)(iv) was some statutory provision other than Section 227(b) would serve both the Commission's interests and promote the public's interest in fairness and justice.³⁵ By making clear that Section 64.1200(a)(3)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission could assist businesses by removing the threat of massive class-action lawsuits based solely on communications with consumers who expressly consented to receive them. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers. Purported violations of the rule where there is no actual harm could still be addressed, but would not be subject to multi-millions of dollars in statutory damages claims. By contrast, declining to clarify the basis of Section 64.1200(a)(3)(iv) leaves the courts to guess at the Commission's exercise of jurisdictional authority, complicating class action suits pending around the country and prejudicing litigants who could otherwise have a clear defense.

II. ALTERNATIVELY, PETITIONERS SHOULD BE GRANTED WAIVERS.

If the Commission declines to issue a declaratory ruling as discussed above, Prime Health respectfully requests a retroactive waiver of Section 64.1200(a)(3)(iv) for fax advertisements sent since the effective date of the rule for which Petitioners obtained prior express consent.³⁶ Section 1.3 of the Commission's rules permits the Commission to grant a waiver for good cause

³⁵ Cf. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agencies to articulate the basis for its rules can "assist judicial review" and help to ensure "fair treatment for persons affected by a rule").

³⁶ See *In re United Telephone Co. of Kansas et al.*, Order, 25 FCC Rcd 1648, 1650, ¶ 5 (2010) (retroactive waiver may be issued as long as prior effective date of the waiver is specified); see also *In re Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 20 FCC Rcd 5433 (2005).

shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest.³⁷ A waiver is appropriate where “[t]he underlying purpose of the rule(s) would not be served” or “unique or unusual factual circumstances” mandate a waiver to avoid an application of the rule that would be “inequitable, unduly burdensome or contrary to the public interest.”³⁸ Here, a waiver is appropriate for both reasons.

The only purpose the Commission has articulated for Section 64.1200(a)(3)(iv) is that an opt-out notice is required “to allow consumers to stop unwanted faxes in the future.” Here, Prime Health sent faxes only to individuals that had expressly agreed to accept them. Plaintiffs do not allege that they were unaware that they could opt out or that any opt out request was not honored in a timely way. Indeed, the plaintiffs do not even allege that they actually wanted to opt out of the receiving the faxes sent by Prime Health. Thus, even assuming that the goal of Section 64.1200(a)(3)(iv) is to allow consumers to easily revoke prior express consent to receive fax advertisements, that goal would not be served by applying the rule to Prime Health in these circumstances.

At the same time, requiring strict compliance with Section 64.1200(a)(3)(iv) with respect to solicited faxes in these circumstances would be inequitable, unduly burdensome, and contrary to the public interest. Prime Health is embroiled in a million-dollar-plus class action lawsuit for an alleged failure to include appropriate opt-out notices on faxes sent to plaintiffs who have suffered no actual harm. Where, as here, recipients of fax advertisements explicitly agreed to receive them, had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so, requiring strict compliance with Section 64.1200(a)(3)(iv) would

³⁷ 47 C.F.R. § 1.3; *In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16,710, 16,714, ¶ 15 (2001).

³⁸ 47 C.F.R. § 1.925(b)(3)(i)-(ii).

be both tremendously burdensome and inequitable. It would also be contrary to the public interest, as exposing fax senders to massive class action liability for engaging in consensual communications with their customers would work an economic injustice on small businesses and the consumers that they serve.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying (1) that Section 64.1200(a)(3)(iv) of the Commission's rules applies only to unsolicited fax advertisements and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(3)(iv) of the Commission's rules. In the absence of such a ruling, the Commission should grant a retroactive waiver of Section 64.1200(a)(3)(iv) for any fax sent by Petitioners with the recipient's prior express consent.

Respectfully submitted,



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Dated December 17, 2013.

CERTIFICATE OF SERVICE

The undersigned certifies that on December 17, 2013, a copy of Petition of Prime Health Services, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver was served upon Milwaukee Occupation Medicine, plaintiff in Milwaukee Occupational Medicine S.C. v. Prime Health Services, Inc., Milwaukee County Case No. 12-CV-8086, through counsel at the following address:

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by:

- ☒ United States Mail, first class, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Electronic Mail

Also on December 17, 2013, Prime Health Services, Inc. filed, by mail, a copy of said petition with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554



Beth A. West

Code of Federal Regulations

Title 47. Telecommunication

Chapter I. Federal Communications Commission (Refs & Annos)

Subchapter B. Common Carrier Services

Part 64. Miscellaneous Rules Relating to Common Carriers (Refs & Annos)

Subpart L. Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising (Refs & Annos)

47 C.F.R. § 64.1200

§ 64.1200 Delivery restrictions.

Effective: October 16, 2013

Currentness

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

- (i) Is made for emergency purposes;
 - (ii) Is not made for a commercial purpose;
 - (iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;
 - (iv) Is made by or on behalf of a tax-exempt nonprofit organization; or
 - (v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.
- (4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--
- (i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and
 - (ii) The sender obtained the number of the telephone facsimile machine through--
 - (A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or
 - (B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.
 - (C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and
 - (iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--
 - (A) The notice is clear and conspicuous and on the first page of the advertisement;
 - (B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future

advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes--

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of

opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is

responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national

do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission

charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term established business relationship for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(9) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term sender for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(12) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or

images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

- (i) To any person with that person's prior express invitation or permission;
- (ii) To any person with whom the caller has an established business relationship; or
- (iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

Credits

[57 FR 53293, Nov. 9, 1992; 60 FR 42069, Aug. 15, 1995; 68 FR 44177, July 25, 2003; 68 FR 50978, Aug. 25, 2003; 68 FR 56764, Oct. 1, 2003; 68 FR 59131, Oct. 14, 2003; 69 FR 60316, Oct. 8, 2004; 69 FR 62816, Oct. 28, 2004; 69 FR 78339, Dec. 30, 2004; 70 FR 19337, April 13, 2005; 70 FR 37705, June 30, 2005; 70 FR 75070, Dec. 19, 2005; 71 FR 25977, May 3, 2006; 71 FR 42297, July 26, 2006; 71 FR 56893, Sept. 28, 2006; 71 FR 75122, Dec. 14, 2006; 73 FR 40185, July 14, 2008; 73 FR 67419, Nov. 14, 2008; 77 FR 34246, June 11, 2012; 77 FR 63240, Oct. 16, 2012; 77 FR 66935, Nov. 8, 2012]

SOURCE: 56 FR 18523, April 23, 1991; 56 FR 25372, June 4, 1991; 56 FR 36731, Aug. 1, 1991; 57 FR 4740, Feb. 7, 1992;

57 FR 21040, May 18, 1992; 57 FR 48335, Oct. 23, 1992; 57 FR 48355, Oct. 23, 1992; 57 FR 54331, Nov. 18, 1992; 58 FR 44773, Aug. 25, 1993; 61 FR 24903, May 17, 1996; 61 FR 50246, Sept. 25, 1996; 61 FR 52323, Oct. 7, 1996; 61 FR 59366, Nov. 22, 1996; 62 FR 39779, July 24, 1997; 62 FR 45588, Aug. 28, 1997; 62 FR 47237, Sept. 8, 1997; 62 FR 64758, Dec. 9, 1997; 63 FR 20338, April 24, 1998; 63 FR 43041, Aug. 11, 1998; 64 FR 51469, Sept. 23, 1999; 64 FR 51718, Sept. 24, 1999; 65 FR 38435, June 21, 2000; 65 FR 48396, Aug. 8, 2000; 65 FR 54804, Sept. 11, 2000; 67 FR 9616, March 4, 2002; 67 FR 22007, May 2, 2002; 68 FR 6355, Feb. 7, 2003; 68 FR 44177, July 25, 2003; 69 FR 62816, Oct. 28, 2004; 71 FR 25977, May 3, 2006; 76 FR 24400, May 2, 2011; 76 FR 26647, May 9, 2011; 76 FR 43205, July 20, 2011; 76 FR 65969, Oct. 25, 2011; 76 FR 67073, Oct. 31, 2011; 76 FR 73882, Nov. 28, 2011; 77 FR 30919, May 24, 2012; 77 FR 34246, June 11, 2012; 77 FR 71137, Nov. 29, 2012, unless otherwise noted.

AUTHORITY: 47 U.S.C. 154, 254(k); 403(b)(2)(B), (c), Pub.L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 227, 228, 254(k), 616, 620, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub.L. 112-96, unless otherwise noted.

Notes of Decisions (122)

Current through December 5, 2013; 78 FR 73371

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